STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

KRIS MICHAEL ALDRICH,

Defendant-Appellant.

FOR PUBLICATION
May 18, 2001
9:05 a.m.

No. 216402
Saginaw Circuit Court
LC No. 98-015911-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

KYALL WILLIAM ALDRICH,

Defendant-Appellee.

No. 216403
Saginaw Circuit Court
LC No. 98-015912-FC

Updated Copy
July 20, 2001

Before: Kelly, P.J., and Whitbeck and Collins, JJ.

WHITBECK, J. *(concurring).*

I concur in the result the lead opinion reaches in both appeals. I write separately to explain why, in my opinion, Kris Aldrich is not entitled to a new trial after he learned that the police had produced a Win Crash analysis purportedly demonstrating that he was driving at a relatively low speed at the time of the crash in this case. Because the scientific, statistical, and engineering components of crime investigation grow ever more important in the way prosecutors try their cases, I analyze whether the prosecutor committed a discovery violation that entitles Kris Aldrich to a new trial with the hope that this analysis will prove useful in other cases.

I. Basic Facts

To understand the potential discovery problem in this case requires understanding the defense theory and the nature of the Win Crash analysis at issue. Kris Aldrich claimed that the collision between the Chevrolet Beretta he was driving and the Chevrolet Lumina Melissa Musick was driving occurred at relatively low speeds because his brakes failed. Thomas Bereza, an accident reconstruction expert testifying for the defense, conducted a Win Crash analysis and concluded from the condition the Lumina was in following the crash, as well as from other evidence, that the highest possible speed Kris Aldrich's car could have been traveling at the time of impact was thirty-six miles an hour and that it was more likely that he was driving more slowly. The prosecutor elicited from his expert accident reconstruction witness, Sergeant William Brandt, that he had run the Win Crash analysis and that he could not determine the speed at which Kris Aldrich was driving at the time the collision occurred. During cross-examination, Joseph Scorsone, Kris Aldrich's lawyer, asked Sgt. Brandt about the Win Crash analysis:

> *Q:* [Y]ou, in fact, ran through the Win Crash program and came up with some results, is that [a] fair statement?
>
> *A:* I attempted to run a Win Crash program, based on the information that was being put into it.
>
> *Q:* What can you elaborate on the error that the machine punched up?
>
> *A:* The error I was getting was what they call a "spin calc." And as I read the manual, the error equates to because from impact to the final rest, the Baretta [sic], when it went airborne over that ditch, didn't go sliding down the ditch, it went over. So in the—the—one of the check boxes that you have is, I believe I mentioned before, is you have the skid end trajectory and you have the—a roll out.
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> Well, we don't have a roll out. We have a skidding up to that point and then the vehicle went airborne. But there's no area in the program to say the vehicle went airborne and have the program figure out that speed, based on the distance and that type of travel, and tell it to determine the speed and such.

> So what I needed to do is I calculated the speed necessary to get across the ditch. And they have a check box for a path-end velocity. So I basically had to input into the program the skid distance from impact to where it went airborne, and then have to give it a path-end velocity, and it just gave me this error.
>
> So I—again, I can't get into the specific algorithms of the program itself, but the program basically didn't like what I had in there and said there was an error and these results are no good.

Following defendants' convictions, the trial court took additional testimony from Sgt. Brandt in conjunction with the defense motions for a new trial. In his posttrial testimony, Sgt. Brandt said that he ran his own Win Crash analysis after receiving a copy of defense expert Bereza's Win Crash analysis to determine whether he would receive the same results for the impact velocity. Sgt. Brandt stated that the impact velocity his Win Crash analysis calculated for the Lumina was 58.7 miles an hour, plus or minus 15.3 miles an hour, and 40.6 miles an hour, plus or minus 10.5 miles an hour, for the Beretta. In other words, on the basis of the data he provided the Win Crash program, Sgt. Brandt concluded the car Kris Aldrich was driving was traveling somewhere between 30.1 and 51.1 miles an hour at the time it struck the Lumina. This range encompassed Bereza's estimate that Kris Aldrich was driving at 35 miles an hour or less at the time of impact. Although he had the printout of his Win Crash analysis with him when he testified at trial, Sgt. Brandt conceded that he never provided the defense with a copy of it, apparently pinning his failure to turn over the analysis on defense counsel's failure to ask for it during cross-examination.

Sgt. Brandt provided a copy of the Win Crash analysis printout to the trial court. The analysis, entitled "WinCrash Project Report," first lists measurements taken from the scene of the accident. Using those data, the analysis determines and diagrams various angles and trajectories the Lumina and Beretta were following leading up to the crash. Page five lists the "Linear Momentum Results" for the two vehicles, i.e., the speeds at various times leading up to impact. On the sixth page, consistent with Sgt. Brandt's testimony, the analysis indicates, "The results are useless when true. Rerun!" and that there was "Spin Calc Error" that applied to the Beretta.

Each of the three attorneys present at the hearing took a different approach to arguing whether the analysis should have been given to the defense and what effect that failure to disclose would have on the postverdict motion for a new trial. Scorsone emphasized that the prosecutor and Sgt. Brandt were on the same "team" for the purposes of the prosecution, which meant that the prosecutor had a duty to produce the analysis. Kyall Aldrich's attorney argued that the analysis corroborated Bereza's report, indicating that a race did not precede the crash. Like Scorsone, he also argued that the prosecutor had an obligation to turn over the analysis, having already made a proper demand, and that the failure to disclose the analysis deprived the jury of an

opportunity to consider it. The prosecutor contended that, under *People v Newhouse*,[1] the defense had to prove that the analysis was newly discovered evidence that would affect the outcome of the trial. However, according to the prosecutor, the evidence concerning the analysis came out at trial and would not have any possibility of affecting the outcome of the trial because, as Sgt. Brandt explained, the analysis failed to reach a conclusion on the speed at the time of impact and Sgt. Brandt did not rely on the results to form his opinion on the circumstances surrounding the crash.

The trial court then ruled from the bench:

> *People v Newhouse*, 104 Michigan Appeals 300, 1981, and many other cases, recite the four factors necessary to establish a claim of newly discovered evidence which would entitle the defendant to a new trial.
>
> First, it must be newly discovered. Second, it may not be cumulative. Third, it is such as to render a different result probable at retrial. And fourth, the defendant must not have been able to, with reasonable diligence, been able to produce this evidence at trial.
>
> During the defendant's discovery demand, the defendants made a request for, inter alia, ["]results of all scientific or other expert tests, including file reports, memorandums, reports made in connection with this case, within the possession, custody or control of the prosecution, the existence of which is known or may become known to the prosecution." End of quote in pertinent part.
>
> In this particular case, the Court determines that the People—that the report, the Win Crash program, was not even in existence until sometime on October 26th, 1998, literally the day before Sergeant Brandt testified.
>
> And when Sergeant Brandt came to court the following day, the prosecutor has said he was not provided a copy of Mr. Brandt's report, and I'll accept that as true. When Sergeant Brandt was on the witness stand, he indicated, among other things, that he did not believe that an expert could come up with any reliable speed, given certain lack of important measurements or adequate measurements which Sergeant Brandt testified to in this case. This all came out on direct examination.

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[1] *People v Newhouse*, 104 Mich App 380; 304 NW2d 590 (1981).

He said that the measurements conducted by the investigators at the crime scene, from the sheriff 's department, simply were not adequate, and he detailed in specifics why they weren't.

He also testified that there were three tire marks that could not have been related to this motor vehicle accident, and that any other persons who would indicate that they did, to the extent that those other persons, including another expert, utilized those marks as part of a speed calculation, they would be, "dead wrong," and then emphasized again that he could give a reliable speed demonstration [sic, determination].

Now, it's instructive in this particular case that the expert did specifically state, during his testimony, that he ran a Win Crash program, and that there was an error in the program. And, quite frankly, if defense counsel had asked to examine a Win Crash program at that point, all they had to do was ask.

So this is not a situation where in this Court's opinion, this is newly discovered evidence. It was known at the time of Sergeant Brandt's testimony [that he] had run a Win Crash program, and that the results were erroneous, and, quite frankly, that duplicates exactly what the Court has heard today and what his report indicates; and that is, is that the results were not reliable.

I don't know how producing the Win Crash program in court could have enabled defense counsel to produce evidence which, ". . . would probably have rendered a different result in this case." Even at best, if it were impeachment—and I can't imagine how it could be—it, in this Court's opinion—impeaching evidence cannot, under the law, be the basis for a new trial; it must be substantive evidence, not impeachment evidence. And I just don't see it here.

And so, A, it's not newly discovered. And B, it would not have probably rendered a different result at trial.

II. The Trial Court's Decision

The record makes clear that the prosecutor and the trial court both relied on case law addressing newly discovered evidence because Kris Aldrich's motion for a new trial claimed that the Win Crash analysis was newly discovered evidence. Nevertheless, the transcript of the postverdict motion plainly indicates that, by the time the parties appeared at the hearing, Kris Aldrich had added a new legal ground to his motion for a new trial: a discovery violation.

Whether Kris Aldrich, through his attorney, should have filed a new written motion to bring this shift in direction to the trial court's attention is not at issue here. Rather, because Kris Aldrich's attorney made this argument so explicitly at the hearing, the issue that interests me in writing this concurrence is whether the prosecutor committed a discovery violation.[2]

III. Discovery Violation

Pursuant to *Brady v Maryland*,[3] prosecutors have a constitutional[4] duty to disclose evidence that is "material either to guilt or to punishment,"[5] including impeachment evidence.[6] This duty to disclose remains[7] regardless of whether the prosecutor has good or bad intentions[8] in withholding evidence and even if the police fail to give evidence to the prosecutor.[9] Thus, in this case, whether the prosecutor actually knew that Sgt. Brandt had generated the Win Crash analysis

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[2] When a trial court does not make a finding on an alleged discovery violation, this Court's modern approach to determining whether the prosecutor unconstitutionally suppressed evidence has been to remand the case to the trial court. See *People v Lester*, 232 Mich App 262, 282-283; 591 NW2d 267 (1998). However, the trial court judge who presided in this case, Judge Meter, is now an esteemed colleague on this Court. Though a new judge assigned to address a remand would likely be able to deal with this issue deftly, the new judge would lack the insight into the case that Judge Meter would have. More importantly, this opinion does not represent the majority's view, which allows this analysis to be an academic exercise, making remand unnecessary.

[3] *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

[4] The prosecutor's ethical duty to "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the degree of the offense" under MRPC 3.8(d) adds more support to the notion that disclosure is critical.

[5] *Brady*, *supra* at 87.

[6] *United States v Bagley*, 473 US 667, 676-677; 105 S Ct 3375; 87 L Ed 2d 481 (1985); see also *Lester*, *supra* at 281.

[7] Prosecutors have a "continuing" duty to disclose this sort of material evidence. See MCR 6.201(H); *People v Taylor*, 159 Mich App 468, 475-476; 406 NW2d 859 (1987).

[8] *Brady*, *supra* at 86.

[9] See *Giglio v United States*, 405 US 150, 153-154; 92 S Ct 763; 31 L Ed 2d 104 (1972); see also *Kyles v Whitley*, 514 US 419, 438-440; 115 S Ct 1555; 131 L Ed 2d 490 (1995).

makes no difference in whether Kris Aldrich would be entitled to a new trial under *Brady*. That case has been interpreted to mean that, to earn a new trial, a defendant must demonstrate

> (1) that the state possessed evidence favorable to the defendant; (2) that he did not possess the evidence nor could he have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.[10]

There is no question that the state possessed the data entered in the Win Crash analysis and that it possessed the disputed result it produced. Sgt. Brandt is an agent of the state and, at trial, he conceded that he had produced the analysis. However, from my perspective, one of the more difficult aspects of this case is determining whether the Win Crash analysis generated was favorable evidence within the meaning of *Brady's* first element. In *Kyles v Whitley*,[11] the United States Supreme Court interpreted the commentary on "favorable evidence" contained in *United States v Bagley*,[12] to mean that "favorable evidence is material, and constitutional error results from its suppression by the government, 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'"[13] The *Kyles* Court went on to explain:

> The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial."[14]

This reasoning is somewhat circular in that it relies on the fourth element of the *Brady* test to define what constitutes favorable evidence, a threshold question in the first element. This explanation in *Kyles* helps to narrow the class of evidence subject to the discovery rule to those pieces of evidence that are likely to make a trial fair. Evidence immaterial to the fair conduct or result of a trial are not subject to the *Brady* rule. Thus, I interpret the approach required under *Kyles* to mean that the evidence allegedly suppressed must be viewed in the context of the trial,

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[10] *Lester*, *supra* at 281-282.

[11] *Kyles*, *supra* at 433.

[12] *Bagley*, *supra*.

[13] *Kyles*, *supra* at 433, quoting *Bagley*, *supra* at 682.

[14] *Kyles*, *supra* at 434.

with materiality determined from the role the evidence would have played at trial had the defense known of its existence and had access to it.

The parties hotly contest whether the Win Crash analysis would have made Kris Aldrich's trial fair. They do not, however, distinguish between the logical components of the Win Crash analysis. On one hand there is the *data* that went into the Win Crash analysis. For the most part, no one disagrees that the defense was entitled to this evidence and that it had adequate access to and notice of the pertinent ground measurements that Sgt. Brandt used when he ran the Win Crash software.[15] In any event, Kris Aldrich does not claim that the prosecutor improperly withheld these measurements and, in fact, defense expert Bereza evidently had sufficient evidence of this sort to run the Win Crash analysis himself.

On the other hand is the *result* Sgt. Brandt's Win Crash analysis allegedly produced, arguably the most valuable part of an expert's report.[16] The prosecutor did not reveal this result to the defense at any time before or during trial and, despite what seemed to be fairly rigorous cross-examination, Sgt. Brandt did not reveal those results during his trial testimony. Thus, the discovery violation question in this case becomes a narrow one: Did the prosecutor have an obligation under *Brady* to reveal the disputed *result* of the Win Crash analysis to the defense because it was favorable evidence and, without such a disclosure, is the verdict to be trusted?

This focus on the Win Crash result is somewhat at odds with the focus in the typical discovery violation case. The Win Crash result is not evidence of the crime in the sense that a bloody knife would be evidence of a murder or a videotape might record a bank robbery, both of which are clearly material evidence.[17] Rather, the Win Crash analysis attempts, not always successfully, to piece together disparate pieces of evidence gathered from the scene of a crash in order to give a meaningful description of the largely invisible physical forces that contributed to that crash. When Win Crash provides a description of those physical forces—the result—trained experts like Bereza and Sgt. Brandt are supposed to be able to "reconstruct" events leading up to

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[15] Kris Aldrich did not argue in the trial court and has not argued on appeal that the prosecutor should have revealed the calculations Sgt. Brandt made to fill in the data missing because the Beretta left the ground.

[16] See *Williams v Taylor*, 529 US 420, 438-439; 120 S Ct 1479; 146 L Ed 2d 435 (2000) (allegedly undisclosed psychiatrist's report of accomplice "concluded" that the accomplice had little memory of the rape and double murder, despite trial testimony recalling the crime); *Pitchess v Davis*, 421 US 482, 483; 95 S Ct 1748; 44 L Ed 2d 317 (1975) (suppressed laboratory report revealed that police testing failed to find sperm on samples taken from victim after rape); *United States v Beaver*, 524 F2d 963, 965-966 (CA 5, 1975) (prosecution turned over fingerprint expert's entire report, which did not include the number of points used to identify fingerprints as part of conclusion).

[17] See MCR 6.201(A)(6).

a crash, providing insight into the accident that, perhaps, even an eyewitness would not be able to give when testifying. In other words, even though they did not observe the crash, these experts are remarkably valuable to the truthfinding function that a trial serves because they know how to analyze the data and interpret the result.

Given the critical role this sort of data analysis plays in forming expert opinion, I agree that the prosecutor ordinarily has an obligation to reveal Win Crash analysis results to the defense. Typically, these results will be relevant to impeaching the expert witness who gives an opinion on what contributed to an accident, such as impact speed.[18] Or, as Kris Aldrich contends in this case, these results may corroborate an exculpatory defense theory, such as his explicit claim that the evidence did not prove that he was speeding at the time of the crash. This could contradict the prosecutor's theory that Kris Aldrich was guilty of involuntary manslaughter because he was committing an unlawful act, drag racing, at the time of the accident.[19] Even the court rules recognize the critical value of a report prepared by an expert in requiring that the defense and the prosecution disclose "any report of any kind produced by or for an expert witness whom the party intends to call at trial[.]"[20]

This, however, is not an ordinary case, because the Win Crash analysis never actually produced a result. Evidently, the Win Crash software relies on measurements taken from the ground and, because the Beretta left the ground when it flew over the ditch, Sgt. Brandt had to estimate other numbers to enter in the Win Crash program to replace missing ground measurements. The Win Crash software was able to determine that the numbers he entered did not, or perhaps could not, accurately describe the physical forces at work, because the "spin calc" was erroneous. Although, taken at face value, the printout of the Win Crash analysis "reported" results on page five, the Win Crash software noted that Sgt. Brandt had not provided the data necessary to *complete* the analysis even though the software indicated what it would conclude had those numbers been true. Consequently, the Win Crash report stated that the analysis had to be performed again, indicating to any reader that the report should be read as if page five were blank because the erroneous calculations were of no consequence. With these facts, it would be logically inconsistent to conclude that the Win Crash analysis produced a result that the prosecutor should have shared with the defense, regardless of whether it was "favorable" to the defense, when the software itself acknowledged that the data could not support a final finding.[21]

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[18] See *People v Brownridge (On Remand)*, 237 Mich App 210, 214; 602 NW2d 584 (1999) ("Impeachment evidence . . . falls within the *Brady* rule.").

[19] See *People v Holtzman*, 234 Mich App 166, 188; 593 NW2d 617 (1999) ("Prosecutors must provide each defendant with any exculpatory information or evidence known to them.").

[20] MCR 6.201(A)(3).

[21] Note that *Random House Webster's College Dictionary* (2d ed) defines a result as an "outcome."

The uniqueness in this case comes from *the lack of* a result. I see the possibility that, in another case, an expert witness might choose to *disregard* a result produced by a Win Crash analysis on the basis of statistical improbability when forming an opinion on what caused an accident. In that case, despite the questionable validity of the result, I would conclude that the prosecutor must turn that information over to the defense, which can then determine whether to present the evidence to the jury.[22] Juries, not prosecutors, are entrusted with the obligation of determining the ultimate value of evidence, which is why courts encourage placing all relevant and admissible evidence in front of the jury.[23] Thus, the prosecutor and defense would offer differing arguments concerning why the jury should or should not rely on the Win Crash result to render a verdict. However, in this case, the prosecutor neither deprived the defense of an opportunity to present Sgt. Brandt's Win Crash result to the jury nor usurped the jury's authority to weigh the evidence because Sgt. Brandt's analysis *did not produce a result*.

Even assuming that the Win Crash analysis constituted real evidence that the prosecutor suppressed—which the defense had taken every reasonable effort to secure by making a comprehensive discovery request—it was nevertheless immaterial to the fairness of the trial. Had Sgt. Brandt attempted to draw any conclusions from the Win Crash analysis, the defense would have been well-advised to object to related testimony, or an offer to admit the Win Crash analysis printout into evidence, as irrelevant.[24] The Win Crash analysis itself warned that the speeds it had calculated "are useless when true," indicating that they were false calculations. Having virtually ordered the individual inputting the data to "Rerun!" the program, no one can doubt that the Win Crash analysis had failed to reach a result, regardless of the statistical measures of validity that could shake or shore up confidence in any particular result. Fair trials simply are not made with evidence that proclaims itself, independent of external judgments, untrustworthy and patently worthless. Had the defense been able to introduce the miscalculations in the Win Crash analysis at trial, I would be no more certain that Kris Aldrich, or his brother for that matter, received justice through the process a fair trial affords.

IV. Final Notes

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[22] I have not attempted to analyze whether the Win Crash analysis is a report within the meaning of MCR 6.201(A)(3). However, I think it possible that a "report" under MCR 6.201(A)(3) requires some of the same indicia of finality or conclusion that the Win Crash analysis in this case lacks. To paraphrase Justice Souter, writing for the majority in *Kyles*, *supra* at 439-440, prosecutors cannot avoid making fine line determinations concerning what evidence to disclose and, if there is any error to be made, it should be made in favor of disclosure. Thus, even when of questionable value, the prosecutor should turn over analysis results.

[23] See, generally, *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992), quoting *People v Palmer*, 392 Mich 370, 375-376; 220 NW2d 393 (1974) ("'It is the function of the jury alone to listen to testimony, weigh the evidence and decide the questions of fact . . . .'").

[24] MRE 401.

Though I conclude that there was no discovery violation in this case, one more point bears mentioning. At the hearing on the motion for a new trial, the prosecutor argued, in part, that a new trial was not necessary because Sgt. Brandt had not relied on the Win Crash analysis in forming his opinion concerning the crash. That is not relevant to determining whether, assuming that the prosecutor did suppress favorable evidence, Kris Aldrich is entitled to a new trial. For strategic reasons, prosecution experts will likely choose *not* to rely on the most material *exculpatory* evidence, just the sort of evidence the prosecutor must provide to the defense. Moreover, the argument that Sgt. Brandt, whose testimony was critical to the prosecution, did not rely on the Win Crash analysis is akin to arguing that even without submitting the Win Crash analysis to the jury, the evidence adduced at trial was still sufficient to sustain a conviction. The United States Supreme Court has made it clear that sufficiency of the evidence is *not* the standard courts apply when determining whether the prosecutor acted unconstitutionally in suppressing evidence.[25]

/s/ William C. Whitbeck

[25] See *Kyles*, *supra* at 434-435.